

That should really dispose of the application but Counsel for the second defendant has contended that the plaintiff has been guilty of laches or inordinate delay warranting the court to exercise its discretion against her. I shall therefore have to consider whether the conduct of the plaintiff has been such as to disentitle her to equitable relief. In this regard I think one has to bear in mind that two firms of solicitors have acted for the plaintiff since her present suit was filed on September 20, 1974. The first was Ng Ek Tiong & Partners and the second Skrine & Co. I do not think dilatoriness or inordinate delay can be attributed to the plaintiff since the time Skrine & Co. came into the picture on December 8, 1980 (See Encl. 17) and then took the following steps: first, filing the application to amend the statement of claim on March 10, 1981 by adding the second defendant to the suit and alleging in essence fraudulent conduct against the first and second defendants (See Encl. 19); secondly, filing the defence to the second defendant's counterclaim on August 3, 1982 (See Encl. 26); and lastly, filing the summons for directions pursuant to Order 25 of the Rules of the High Court 1980 on April 1, 1983 (See Encl. 27), the hearing of which has been postponed. I think what could be in issue is the conduct of the plaintiff before Skrine & Co. came into the picture and acted with despatch as her solicitors. Was she guilty of laches or undue delay up to that time? Counsel for the second defendant has attempted to show this, firstly, by referring to the protracted correspondence between the then solicitors of the plaintiff and the solicitors of the first defendant and, secondly, by pointing out that the plaintiff entered her first caveat in respect of the land only on June 28, 1978, nearly four years after the filing of her present action on September 20, 1974, well after the second defendant had been registered as the proprietor of the land on March 13, 1974 and more than five years after the purported date of repudiation of the agreement on July 23, 1973. Counsel for the plaintiff concedes that there has been delay but is unable to furnish any reason for it except to surmise that the plaintiff must have been advised by her previous solicitors that all was well in their conduct of her case. It is however, to my mind, most significant that no attempt has ever been made by either of the defendants to have the present suit struck off for want of prosecution. I have no reason to believe on the basis of the affidavits and other relevant documents in the file that the plaintiff's conduct has been intentional or contumelious or has prejudiced the defendants. Having regard to all the circumstances in this case

- A I do not think it just and reasonable to penalise the plaintiff by exercising my discretion against her. Nor do I think that damages in this case will provide adequate remedy in the event that the plaintiff has suffered any injury. Nor do I think undue hardship will be caused to the second defendant as a result of the second caveat continuing in force.

In the result the application is dismissed with costs.

- C I would like to add that this is, in my view, a fit and proper case to go for early trial and I accordingly order that it be entered for early trial.

*Application dismissed.*

- D Solicitors: Skrine & Co.; Sri Ram, Zulkifly & Kumar.

# TSIA DEVELOPMENT ENTERPRISE SDN. BHD. v. AWANG DEWA

[O.C.J. (Tan Chiaw Thong J.) November 11, 1983]  
[Miri — Civil Suit No. K633 of 1979]

- F *Evidence — Admissibility of document — Document, carbon copy of type-written original — Burden of proof on party producing document — Document not admissible under section 62 of Evidence Act 1950 — Evidence Act 1950, ss. 62, 64, 65(1)(c), 90 & 136(2).*

- G In this case the plaintiff objected to the admissibility of a document headed "Surat Keterangan" which the defence seeks to adduce as evidence. The document was a carbon copy of a type-written original.

**Held:** (1) it falls upon the party seeking to produce a document to show that it is admissible in law;

- H (2) due execution of the original must be proved before it can be admitted. The defendant should therefore be allowed to prove the contents of the document sought to be produced under section 65(1)(c) of the Evidence Act, subject to learned counsel for the defendant giving a satisfactory undertaking that due execution will be proved.

*Case referred to:*

- I (1) *Kunwar Basant Singh & Ors. v. Kunwar Brij Raj Sawan Singh* (1935) I.A. 180.

CIVIL SUIT.

T.O. Thomas for the plaintiff.  
M.S. Sandhu for the defendant.

*Cur. Adv. Vult.*

Tan Chiaw Thong J.: Learned counsel for the Plaintiff objects to the admissibility of a document headed "Surat Keterangan" which the defence seeks to adduce as evidence. It is common ground that the document is a carbon copy of a type-written original.

The objection is based on 3 grounds:—

- (1) That the production of a copy of the document is not sufficient to justify the presumption of due execution of the original under section 90. This ground is based on the Privy Council case of *Kunwar Basant Singh & Ors. v. Kunwar Brij Raj Saran Singh*<sup>(1)</sup> the relevant part of the headnote of which reads:

"Sect. 90 of the Indian Evidence Act (I. of 1872) requires the production to the Court of the particular document in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted under section 65 as secondary evidence, and it is produced from proper custody and is over thirty years old, then the signatures authenticating the copy may be presumed to be genuine, but the production of a copy is not sufficient to justify the presumption of due execution of the original under section 90."

Section 90 of the Indian Evidence Act is *in pari materia* with the corresponding section of our Evidence Act 1950, except that in the latter Act the relevant period is 20 years; and section 65 of the former Act is similar to the corresponding section of the latter Act. The first observation I wish to make is that the document sought to be produced here has not yet been admitted under section 65; but on the assumption that it is so admitted, it seems clear that the presumption as to the signatures in it, and its due execution, may, having regard to the provisions of section 90, only be drawn if the original document itself is produced and admitted in evidence. In other words, if a copy is admitted under section 65, then a presumption under section 90 does not, in my view, arise. Due execution will have to be proved by the party producing such copy. In my view, the *Kunwar Basant Singh*'s case is authority for that proposition.

The second ground of objection is based on the caution against accepting such a document under section 90 without due care and caution, and reference was made to the commentaries in paragraph 4 under the heading "Presumption as to Ancient Documents" at Page 732; and to those in paragraph 3 under the heading "Corroboration of Ancient Documents" at Page 733, of *Sarkar* on Evidence (12th Edition) respectively. It was also

- A pointed out that the alleged signature of Abang Samsudin on the document sought to be produced by the defence bore no resemblance at all to those in Exs. P1, P2A, D1 and D2. In this connection, I would observe that, even if the document sought to be produced is not admissible under section 90 — and the defence is not seeking to rely on this section for admissibility — it is still open to the defence to establish that it is admissible under any other section of the Evidence Act, 1950. I shall deal with this aspect of the matter when considering the submissions of learned counsel for the defence.

- As to the third ground of objection, it is submitted that, by virtue of sections 119, 120 and 137 of the Land Code, the document sought to be produced is inadmissible. I have fully considered the sections of the Land Code cited and the submissions on this ground, taken in the light of the contents of the document sought to be produced which I have to look at for the purposes of this ruling, and I am of the view that the sections cited, as distinct from being relevant to any legal effect of the document sought to be produced, are no bar to its admissibility, if it can be shown to be admissible under any provision of the Evidence Act, 1950.

- I would further observe that it falls upon the party seeking to produce a document to show that it is admissible in law.

- Learned counsel for the defendant has submitted that the document, being a carbon copy, is admissible under section 62 of the Evidence Act, 1950. Section 61 stipulates: "The contents of documents may be proved either by primary or by secondary evidence"; and section 64 states: "Documents must be proved by primary evidence except in the cases hereinafter mentioned." The relevant part of section 62 provides: "Primary evidence means the document itself produced for the inspection of the court ... Explanation 2 — Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original." In this connection, reference was made to the commentaries at Page 601 of *Sarkar* on Evidence (12th Edn.), under the paragraph headed "Explanation 2: (Document by Uniform Process)", the relevant part of which reads:

"Where a number of documents are made by a uniform process, e.g. printing, photography, cyclostyle or lithography, they are not copies in the legal sense of the term. They are all counterpart originals and each is primary evidence of the contents of the rest, but only secondary evidence of the common originals (see *Nodin v. Murray*, 3 Camp. 228)."

In this connection, I do not, with respect, see how it can be said that the document sought to be produced was "made by a uniform process", having regard to the examples listed in particular under Explanation 2 to section 62, it being common ground that the document is a carbon copy of a type-written document; but even if I am wrong on this, the quotation from *Sarkar* on Evidence above, in my opinion, shows that it is not primary evidence, as submitted, but secondary evidence of the common original.

Reference was also made to the second paragraph at Page 602 of *Sarkar* on Evidence, the relevant part of which reads:

"Carbon copies produced by type-writers may for all practical purposes be regarded as equivalent, though the impressions on the lower sheets are likely to be imperfect.

"They are produced by the same stroke which makes the surface impression."

In this connection, it is to be observed that the commentary does *not* state that such carbon copies are admissible as equivalent to primary evidence; it mentions that such carbon copies may be regarded as equivalent, "for all practical purposes", whatever that expression may mean in the context. I do not regard that the quotation above is authority for the proposition that such carbon copies should be regarded as primary evidence. The commentary goes on in the same paragraph:

"In *Federal U S Co. v. Indian, L. & M Co.* 176 Ind. 328, in the case of a machine carbon-copy in triplicate, each one was held an original."

Having regard to the wording of Explanation 2 to section 62 which is relied upon, and in the absence of a full report of the case quoted, I am unable to accept that a type-written carbon copy should be admitted as an original. Further, there is no evidence to show that the signatures in the document sought to be produced have been made by one uniform process. In the same paragraph of *Sarkar* on Evidence, it is stated:

A "If after a document is typed the original is signed and sent and the copy is initialled, the copy could not be said to have been made by one uniform process (*Venkataramana v. Narayanarao*, A1937 M 807)"

B so that, in my view, the same could be said where the signatures have not been made by one uniform process.

C Another point raised by learned counsel for the defendant is that the signatures on the document are not copies, but originals. In this respect, I do not see how without evidence as to the authenticity or proof of such signatures, they can be regarded as originals.

D For the reasons given, I rule that the document sought to be produced is not admissible under section 62 of the Evidence Act, 1950, as relied upon by the defence.

The defence also relies on section 65(1)(c) of the 1950 Act for admissibility.

E Learned counsel for the defendant has submitted that the relevant requirements in section 65(1)(c) have been fulfilled by the defendant, so that the document sought to be produced is admissible thereunder as secondary evidence of the original. On the other hand, learned counsel for the plaintiff has contended in effect that there is no sufficient evidence to show that the original existed. It was pointed out that D.W.3 who had been staying with Abang Samsudin, his late father, for 16 years since birth, knew nothing about such existence and that if it existed, it would be natural for his late father to say something about it. In this connection, I do not regard this submission to be sound since there is no evidence on which the Court can base a finding or conclusion, that, if the original existed, D.W.3 would have known about it and his late father would have told him about it.

H It was also contended that the original is a fictitious document, and that the signature of Abang Samsudin in the document sought to be produced looked like a traced signature created on a piece of old paper, and it was reiterated that, I the Court should bear in mind that it is dangerous to accept it without due care and caution. In this connection, I would reiterate that it falls upon the defendant to prove due execution of the document, and if he fails to do so, it cannot be admitted. I shall elaborate on this later. I certainly would

bear in mind that the court would exercise due care and caution before admitting it in evidence.

The relevant provision of section 65(1)(c) reads:—

“65(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:—

(c) when the original has been ... lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time.”

Although learned counsel for the defendant has quoted the second part of section 65(1)(c), as set out above, I do not consider that it applies here, for the reason that there is no question of the defendant being unable to produce the original in reasonable time. Thus, one is left to consider whether there is sufficient evidence to show that —

- (1) the original is admissible in evidence; and
- (2) the original has been lost.

On the evidence before me, and bearing in mind the submissions of learned counsel for both parties, I am satisfied that the defendant has adduced sufficient evidence to show that an original existed and has been lost, having regard, in particular, to the evidence of D.W.1 and D.W.3. This satisfies condition (2) above. However, this leaves the question as to whether such an original is admissible in evidence. In this respect, it seems clear, from the evidence of D.W.1 and the contents of the document which is sought to be admitted, that the defendant is alleging that the original has been executed by 3 persons, including the defendant and Abang Samsudin. As stated earlier, admission of the document raises no presumption in favour of due execution: it still falls upon the defendant to prove due execution before admissibility could be ruled in his favour. In this connection, I would adopt the procedure set out at Page 613 of *Sarkar* on Evidence, para. 5, which I set out in extenso:

“Order of Proof. (Whether Execution or Contents to be Proved First). When on account of the unavailability of the original, secondary evidence of its contents becomes relevant, a question may arise as to whether the execution of the document should be first proved, or its contents should first be shown. As a general rule, there must be evidence of execution before evidence of contents is offered. The court has, however, a discretion under s. 136 to reverse the order on an assurance that proof of the former will be forthcoming. In *Kimbal v. Morrill*, 4 Greenl 368, 370 it has

A been observed that a party “should first prove that an instrument was duly executed with the formalities required by law; ... then and not till then, he is permitted to give evidence of its contents” (cited Wig s. 1189). Similarly, loss of a document ought generally to be proved first before giving evidence of existence and execution. But it is somewhat difficult to prove the loss of a document first without some reference to its existence and that it purports to have been executed by a certain person, otherwise it is not possible to describe what is lost. General evidence having been given as to the description of the document, due execution may be proved afterwards. Loss of the document should also be proved first before giving secondary evidence of its contents. Here also it is difficult to prove what is lost without a general reference to the tenor of the document. After this is done, the contents should be proved. In all these cases the court has a discretion under s. 136 which will be exercised in proper cases.”

The relevant part of section 136 of the 1950 Act reads:

D “136(2) If the fact proposed to be proved is one of which evidence is admissible only on proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the fact and the court is satisfied with the undertaking.”

E Here, what is sought to be proved by the document sought to be produced are the contents thereof, as secondary evidence of the contents of the original. In my opinion, due execution of the original must be proved before it can be admitted, and, under section 136(2) quoted above, the contents of the document sought to be produced are admissible only on proof of due execution of the original. In this respect, I am prepared, in exercise of my discretion under the same section, to allow the defendant to prove the contents of the document sought to be produced under section 65(1) G (c), subject to learned counsel for the defendant giving a satisfactory undertaking that due execution will be proved. If, therefore, it is alleged that the original is similarly executed as the document sought to be produced, due execution of the original must be proved. Likewise, in my view, due execution of the document sought to be produced. H In this connection, I would refer to paragraph 7 at page 1266 of *Sarkar* on Evidence, which reads:

I “When Facts Proposed to be Proved Are Admissible Upon Proof of Other Facts. Para 12 is to be read with s.104 and the illustrations attached therein. Illustration (b), attached to this section, and illustrations (a) and (b) attached to s. 104 clearly explain the meaning of this clause. Illustration (b) attached to s. 136 and illustration (b) attached to s. 104 are almost similar. An undertaking by the party or his lawyer to give proof, at any convenient stage, of some fact upon which depends the admissibility of the act proposed to be proved enables the party to prove the latter

fact. If the undertaking is not observed the evidence should be expunged."

In reaching my decision, I also have regard to the provisions of section 104, which read:

"The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

I need hardly add that if due execution is not proved, then the document sought to be produced is, in my opinion, not admissible in evidence.

*Order accordingly.*

Solicitors: *Thomas & Co.; M.S. Sandhu & Co.*

### YEAK CHIE CHAI v. GAN BEE AIK

[A.C.J. (Shankar J.) December 6, 1983]  
[Muar – Civil Appeal No. 17 of 1983]

*Evidence – Court allowed re-examination but there was no cross-examination – Re-trial ordered – Evidence Act 1950, s. 138(3).*

This was an appeal by the plaintiff/landlord who claimed vacant possession against the defendant/tenant. In the court below, the plaintiff gave evidence in support of her case. But in her examination-in-chief her counsel omitted to adduce evidence relating to the notice to quit and the fact that the premises were constructed in 1956. The defendant was given an opportunity to cross-examine which he did not exercise. Then in re-examination which the learned Magistrate permitted, the plaintiff tendered certain documents. The learned Magistrate admitted these documents into evidence and marked them as exhibits. Thereafter, instead of inviting the defendant to cross-examine on these documents the learned Magistrate went on to hold that the evidence adduced by the plaintiff did not show that she was claiming vacant possession and therefore dismissed the claim with costs. The learned Magistrate held that since the said documentary evidence was only put in during re-examination and was not properly identified, the learned Magistrate was not obliged to treat this as admissible evidence which he had to consider. He went on to hold that the plaintiff had failed to discharge the burden of proof.

Held: (1) in this case there was no cross-examination. Therefore it follows that there should have been no re-examination;

(2) since certain documents were admitted as evidence the learned Magistrate was obliged to consider the effect of these documents on the plaintiff's claim;

(3) what happened was not a re-examination but an extension of the examination-in-chief. Having got that far the learned Magistrate should have given the defendant

A opportunity to cross-examine the plaintiff upon this additional material;

(4) in all the circumstances the needs of justice would be met if the case was remitted for a re-trial.

### CIVIL APPEAL.

B *Pritam Singh Brrard* for the appellant.

*Tan Lip Yip* for the respondent.

*Cur. Adv. Vult.*

C

Shankar J.: This is an appeal by the plaintiff who was the owner of certain premises of which she sought vacant possession from the defendant who was a monthly tenant. Before instituting the action she had served the tenant with a notice to quit which appears to be in proper form. There was also evidence that the premises had been constructed in 1956. Therefore the premises were not subject to the control of rent legislation.

D

E

In the court below the plaintiff gave evidence in support of her case. But in her examination-in-chief her counsel omitted to adduce evidence relating to the notice to quit and the fact that the premises were constructed in 1956.

F

The defendant was given an opportunity to cross-examine which he did not exercise.

Then in re-examination which the learned Magistrate permitted the plaintiff tendered the following exhibits:—

G

A notice to quit.  
An A.R. card,  
A letter from the Town Council dated 6.11.77 proving construction in 1956.  
The title deed.  
A receipt for assessment.

H

The learned Magistrate admitted these documents into evidence and marked them exhibits P1, P1A, P2, P3 and P4.

I

Thereafter, instead of inviting the defendant to cross-examine on these documents the learned Magistrate went on to hold that the evidence adduced by the plaintiff did not show that she was claiming vacant possession and therefore dismissed the claim with costs.

In his Grounds of Judgment, the learned Magistrate states that since the documentary evidence